APPENDIX A.

PRINCIPAL STATUTORY PROVISIONS INVOLVED.

Section 8(b) of the PPIA, 21 U. S. C. § 457(b), provides as follows:

> "The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section."

Section 9(d) of the PPIA, 21 U. S. C. § 458(d), provides as follows:

> "The following acts or the causing thereof are prohibited:
>
> * * * * *
>
> "(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

Section 12(a) of the PPIA, 21 U. S. C. § 461(a) provides as follows:

> "Any person who violates the provisions of section 458, 459, 460, or 466 of this title, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission or failure of such individual, partnership, corporation, or association, as well as of such person."

Section 14 of the PPIA, 21 U. S. C. § 463, provides as follows:

> "The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter."

Section 18(a) of the PPIA, 21 U. S. C. § 467(a) provides as follows:

> "(a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this chapter shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter."

Section 10(e)(B) of the Administrative Procedure Act, 5 U. S. C. § 1009, provides as follows:

> ". . . the reviewing court shall . . .
>
> (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX B.

THE CHALLENGED AMENDMENTS TO USDA REGULATIONS.

Title 7—AGRICULTURE.

Chapter I—Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture.

Subchapter D—REGULATIONS UNDER THE POULTRY PRODUCTS INSPECTION ACT.

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS. Minimum Poultry Meat Content Standards and Exemptions.

Under authority contained in the Poultry Products Inspection Act, as amended (21 U. S. C. 451 et seq.), the Agricultural Marketing Service hereby amends §§ 81.1, 81.6, 81.134, and 81.208 of the regulations governing the inspection of poultry and poultry products (7 CFR, as amended, 81.1, 81.6, 81.134, and 81.208) as set forth below.

Statement of considerations. The amendments establish minimum poultry meat content standards and similar standards for labeling purposes for numerous poultry food products, and, under specified conditions, exempt from definition as poultry products under the Act, certain human food products which contain small amounts of poultry. The amendments also revoke the present exemptions from the definition of "poultry product" for certain foods which contain more than minimal amounts of poultry and in lieu thereof except the preparation of such articles from the

definition of "processing" operations required to be conducted under Federal inspection unless otherwise exempted.

Tentative proposed standards for minimum poultry meat content for various poultry food products were circulated among members of the poultry processing industry in April 1963. Similar proposed standards for these and additional poultry products, including poultry soup, were published in proposed amendments of § 81.134 of the regulations in a notice of rule making in the FEDERAL REGISTER of October 15, 1963 (28 F. R. 11017). On February 29, 1964, there were published in the FEDERAL REGISTER (29 F. R. 2892) alternative proposals to amend § 81.208(a) of the regulations relating to the exemption of certain consumer packaged human food products which contain poultry. The most controversial matter involved in the proposed amendments was the proposal to require that consumer packaged poultry soup products contain at least two percent poultry meat when ready to serve if they are to bear the unqualified kind name of the poultry in the product name. This matter was the subject of an oral public hearing held in Washington, D. C., on March 23-25, 1964, pursuant to notices published in the FEDERAL REGISTER (28 F. R. 14432; 29 F. R. 530). At the hearing, consideration was also given to the proposed amendments of § 81.208(a).

Consideration has been given to all data, views and arguments presented at the hearing or in writing pursuant to the notice of rule making and to all other relevant information available in the Department of Agriculture. As would be expected, representatives of the varying economic interests presented sharply opposed data, views and arguments. Most of the information presented was useful in establishing the facts and the Department is appreciative to those who submitted such information, particularly the consumer oriented groups.

The amendments now adopted modify the entire § 81.208 of the regulations by limiting the present exemptions from the definition of "poultry product" to specified articles containing minimal amounts of poultry ingredients and by imposing specified labeling requirements for such exemptions. The amendments continue the present requirement that the poultry ingredients used in the exempted articles have been inspected under the Act or an equivalent foreign inspection system. Under the amendments it will be the responsibility of the Secretary of Agriculture to determine whether any particular article complies with the labeling and other requirements which are conditions of the exemptions, and any article which does not in his judgment comply with the conditions would be, ab initio, a poultry product subject to the inspection, labeling, record keeping and other provisions of the Poultry Products Inspection Act. That Act would have no further application to any such exempted product while it qualifies for exemption under § 81.208, and such a product would be subject to regulation under the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301 et seq.), e.g., as to adulteration and factory inspection.

The amendments of §§ 81.1, 81.6, and 81.208 of the regulations except the preparation of poultry sandwiches, poultry fat capsules, and certain poultry food products prepared by caterers or restaurants, from the definition of "processing" operations required to be conducted under Federal inspection under the Poultry Products Inspection Act unless otherwise exempted. The inspection requirement is relieved only if the poultry or poultry products used in such articles have been inspected under the Act or an equivalent foreign inspection system. As poultry products, the excepted articles would be within the applicable provisions of sections 9 and 11 through 18 of the Poultry Products Inspection Act, including the prohibitions of sec-

tion 9 of the Act against the use in commerce of false or misleading labels on poultry products or false representations as to inspection, and including the record requirements of section 11 of the Act. Such articles would be deemed to be eligible for distribution in commerce under the provisions of subsection 9(a) of the Act. Such articles would be subject to regulations under the Federal Food, Drug and Cosmetic Act to the extent that the Poultry Products Inspection Act is not made applicable, e.g., as to adulteration, factory inspection, and required labeling information.

The amendment of § 81.134 establishes minimum poultry meat content standards and similar standards for numerous poultry products. These standards are necessary to prevent the sale of such products under false or deceptive names or other false or misleading labeling and will be used in evaluating labeling of products for purposes of determining their compliance with the Act, not only in the case of products fully regulated under the Act but also in the case of products exempted from inspection under amended §§ 81.1 and 81.6 and in connection with determining whether a product qualifies for a conditional exemption under amended § 81.208.

Formulae are required to be filed with the Department in connection with the procedure for approving labels prior to their use for poultry products under the Poultry Products Inspection Act or for other products containing poultry, inspected under the voluntary program pursuant to the Agricultural Marketing Act of 1946. The Department in establishing the standards, gave consideration to these formulae, to written comments received with respect to the tentative proposed standards and the published proposed standards, and to all other information and data available to it, including that submitted at the oral hearing on March 23-25, 1964. The standards are substantially

the same as those proposed in October 1963, and any changes from the proposal are made pursuant to comments received or in order to state more clearly the requirements and intentions of the Department. Some labeling requirements proposed as a part of § 81.208, which relates to exemptions, have been relocated to § 81.134.

The amendments establish a two percent minimum poultry meat content standard for consumer packaged soup, if it is to bear unqualified kind name in the product name, e.g., "Chicken Noodle Soup." This is supported by substantial evidence as to consumer expectancy presented at the hearing or contained in the written comments submitted or otherwise available to the Department including the previously mentioned formulae which are on file. These comments and testimony came from consumers or consumer oriented groups, representatives of the poultry industry and poultry associations, soup manufacturers, and other interested persons. The large majority of each of these groups favored the establishment of the two percent standard, considered all types of soups to be in the same product class, and supported the labeling provisions of the proposals.

The amendments treat all types of soups—liquid, condensed or dehydrated—as being in the same product class and, therefore, apply the same labeling standards to all types of consumer packaged soup. The proposed amendments of October 15, 1963 did likewise. The Department believes that the form in which a product may be merchandised (i.e., liquid, frozen, or dehydrated) does not affect the end use which may be made of the product by the consumer and, accordingly, should not affect the required minimum poultry meat content of such products when ready-to-serve. Liquid, condensed, and frozen soups bearing the unqualified kind name (chicken, turkey, etc.) in the product name contain two percent or more poultry

meat computed on a ready-to-serve basis. According to testimony presented at the hearing, approximately one-third of the dehydrated soups containing the unqualified kind name in the product name contains two percent or more poultry meat in the ready-to-serve form, and these categories (liquid, frozen, condensed, and one-third of the dehydrated soups) represent in excess of 90 percent of the poultry soups which consumers buy. Therefore, it is reasonable to conclude that this two percent level of poultry meat on a ready-to-serve basis is an acceptable level for a product bearing the unqualified kind name of the poultry in the product name. It is also reasonable to conclude that the labeling of a product containing less poultry meat is deceptive or misleading when the product name is the same as that used on products containing two percent or more poultry meat.

The information offered in opposition to the amendments has been carefully reviewed, and for various reasons has been found inadequate to warrant a decision to abandon or materially change the amendments. For example, reference was made in testimony at the hearing to certain home cookbook recipes for chicken soup as showing that chicken meat was not an ingredient in ready-to-serve chicken soup. However, many cookbooks contain specific recipes for poultry soup which require considerable amounts of chicken in the product when ready-to-serve. There is some question as to whether recipes for home prepared meals serve as a useful guide in establishing standards for similar commercially prepared products.

Mention was made at the hearing of United States military specifications allegedly describing, as "dehydrated chicken soup," a product containing less than two percent chicken meat on a ready-to-serve basis. The Department is informed that the proper name used in the specifications for the product is "Soup, Dehydrated, Chicken Flavored."

The result of certain surveys were presented at the hearing purporting to show that consumers do not expect "chicken soup" to contain chicken meat. The survey procedures used to raise questions as to whether the survey results, in fact, furnished any indication of consumer expectation. The results of one survey were not too helpful in arriving at a decision because consumers were asked to describe the product they purchased but were not asked about what they expected or whether they were satisfied. Another survey consisted of a taste panel test given to a selected group of women who were served a product containing less than two percent chicken meat and asked to identify or name it. Although the Department does not consider that this survey necessarily reflects consumer expectation, if it were to be considered as such, the results support the two percent standard. Roughly, one-fourth (27 percent) of the taste panel members did not identify or name, as "chicken soup," the product served to them. The other 73 percent identified the product as "chicken soup" but the survey did not establish that these panel members found the product acceptable for sale under a "chicken soup" label, and, therefore, did not show that as to them such a label for the product would not be deceptive or misleading. It is reasonable to believe that such labeling would have been misleading to the 27 percent of the panel members who could not even identify the product as "chicken soup."

While the majority of all soup manufacturers were in agreement with the proposed amendments, the majority of the dehydrated soup manufacturers were opposed. They contended that dehydrated soups labeled as poultry soups need not contain two percent or more poultry meat in the ready-to-serve form because such products have been merchandised over a period of years. However, this period began prior to the enactment of the consumer oriented

Poultry Products Inspection Act. The fact that a product has achieved consumer acceptance does not necessarily mean that it does not have misleading labeling. (See *United States* v. *254 Cases of* * * * *Tomato Sauce,* 63 F. Supp. 916.) The amendments will allow these firms to continue to merchandise products which contain less than the specified percent of poultry meat, provided the product is labeled to distinguish it from the standard article and provided it meets the other specified requirements.

The amendments are as follows:

1. Section 81.1 is amended by adding in alphabetical order the following definition:

§ 81.1. Definitions.

* * * * *

Process; Prepare. Process (or prepare), used as a verb, means to conduct any operation or combination of operations, whereby poultry is eviscerated, cut-up, heat treated, canned, packed, labeled, or changed in size, shape, or form, and includes the combining of poultry products with other ingredients, excepting, however, the preparation of sandwiches or fat capsules from domestic or imported poultry or poultry products inspected in accordance with this part, and the preparation, from such poultry or poultry products, of any food product by any caterer or restaurant for serving by such caterer or restaurant directly to consumers, and the packing or labeling of such articles in the course of the excepted operations. The term "process" (or "prepare") does not refer to freezing of poultry or poultry products, except when freezing is incidental to operations otherwise classed as "processing" under this paragraph, in which case the provisions of §§ 81.50 and 81.104 and other applicable provisions of this part shall apply. Other forms of the verb "process" or "prepare" shall be construed accordingly.

* * * * *

2. Section 81.6 is amended to read:

§ 81.6. Establishments requiring inspection.

Every establishment in which poultry is slaughtered for transportation or sale in commerce or for transportation from an official establishment to another official establishment, and every establishment in which poultry products are processed for transportation or sale in commerce shall have inspection under the regulations in this part, except as expressly exempted in this part.

3. Section 81.134 is amended to read:

§ 81.134. Product specifications for labeling purposes.

(a) *Authorization to establish specifications.* The Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

(b) *Labeling terminology for light and dark chicken or turkey meat.* Product containing light and dark chicken or turkey meat in quantities other than natural proportions, as indicated in Table I, must have a qualifying statement in close conjunction with the name of the product indicating, as shown in Table I of this paragraph, the types of meat actually used, except that when the product contains less than 10 percent cooked deboned poultry meat or is processed in a manner that the character of the light and dark meat is not distinguishable, the qualifying statement will not be required. The qualifying statement must be in type at least one-half the size and of equal boldness as the name of the product; e.g., Boned Turkey (Dark Meat). If

a product contains light and dark meat in natural proportions and bears a label referring to light or dark meat content, the label shall include a qualifying statement in accordance with this paragraph.

Table I.

Terminology	Percent light meat	Percent dark meat
Natural proportions	50-65	50-35.
Light or white meat	100	0.
Dark meat	0	100.
Light and dark meat	51-65	49-35.
Dark and light meat	35-49	65-51.
Mostly white meat	66 or more	34 or less.
Mostly dark meat	34 or less	66 or more.

(c) *Poultry meat content of poultry food products*—(1) *General.* (i) Where cooked poultry meat is specified in this section as an ingredient of poultry food products, this means poultry meat derived from poultry processed, cooked and cooled in a manner approved by the Administrator without use of liquid or moisture in direct contact with the poultry meat following the cooking and cooling of the poultry.

(ii) If, following cooking and cooling of poultry meat to be used in poultry food products, liquid or moisture is used in direct contact with such poultry meat and the percentage of solids, excluding salt, in the poultry meat is found to be below 34 percent when such poultry meat is tested by approved methods, the percentage of poultry meat required by this section for any poultry food product shall be increased in proportion to the deficiency, or the meat shall be so processed as to raise the solids content, excluding salt, to 34 percent. The official plant shall furnish adequate facilities for such testing.

(2) *Canned boned poultry.* (i) Canned boned poultry shall, unless otherwise specified in this subparagraph (2), be prepared from cooked deboned poultry meat and may contain skin and fat not in excess of natural proportions. Gelatin, stabilizers or similar solidifying or emulsifying agents shall not be added to product labeled "Boned (Kind) —Solid Pack," but may be added in quantities not in excess of a total of 0.5 percent of the total ingredients in the preparation of other canned boned poultry products and in such case the common name of the substance added shall be included in the name of the product, e.g., "Boned Chicken with Broth—Gelatin Added."

(ii) Canned boned poultry, except poultry within subdivision (iv) of this subparagraph, shall meet the requirements set forth in Table II of this paragraph. The percentages in Table II shall be calculated on the basis of the total ingredients used in the preparation of the product.

(iii) Canned shredded poultry (Shredded (Kind)) consists of poultry meat from the back, wings, and neck, separately or in combination, and shall be prepared as set forth in Table II, items 1, 2, 3 or 4, whichever is applicable. In addition, poultry meat from other parts may be used: Skin and fat not in excess of natural proportions of the parts used may be included.

(iv) Canned boned poultry with natural juices (Boned (Kind) with natural juices) shall be prepared from either raw boned poultry meat or a mixture of raw boned poultry meat and cooked boned poultry meat, and shall have no liquid added during the preparation of the product.

Table II

Product name	Minimum percent cooked deboned poultry meat of kind indicated, with skin, fat, and seasoning	Maximum percent liquid that may be added[1]
1. Boned (Kind)—Solid Pack	95	5
2. Boned (Kind	90	10
3. Boned (Kind) with Broth[2]	30	20
4. Boned (Kind) with percent Broth[2, 3]	50	50
5. Strained or Chopped (Kind) with Broth[2, 4]	43	57

1. Liquid may be in the form of, but is not limited to broth or extractives.

2. Alternatively, product may be prepared from raw boned poultry meat in combination with cooked boned poultry meat so long as the product complies with the specified standard.

3. Total amount of liquid added shall be included in the name of the product; e. g., "Boned Chicken with 25 percent Broth."

4. Label must indicate in some manner that product is for infant or geriatric servings.

(3) *Poultry dinners (frozen) and pies.* Poultry dinners (frozen) and pies shall meet the requirements set forth in Table III of this paragraph and the percentage or weight shall be calculated on the basis of total ingredients used in the preparation of the products.

Table III

Product name	Minimum cooked deboned poultry meat of kind indicated			Minimum raw deboned poultry meat of kind indicated		
	Percent		Weight	Percent		Weight
(Kind) Pies	14	or	1⅛ oz. per 8-oz. pie	25	or	2 oz. per 8-oz. pie
(Kind) Dinners	[1, 2] 18		[2] 2 oz. pie			

(4) *Poultry rolls.* (i) Binding agents, including but not limited to gelatin and wheat gluten, may be added in quantities not in excess of a total of 3 percent for cooked rolls and 2 percent for raw rolls, based on the total ingredients used in the preparation of the product, without affecting the name of the product. However, when such agents are added in excess of 3 percent or 2 percent, whichever is applicable, the common name of the agent or the term "Binders Added" shall be included in the name of the product; e.g., "Turkey Roll—Gelatin Added."

(ii) With respect to heat processed rolls, 2 percent or less liquid based on the weight of the finished product without liquid may remain with or be returned to product labeled as "(Kind) Roll."

1. Excluding weight of appetizers, desserts, etc.

2. 18 percent or 2 ounces, whichever is greater. A minimum of 45 percent, or 5 ounces per dinner, whichever is greater, of cooked poultry including bone and breading may be used in lieu of minimum 18 percent or 2 ounces of cooked deboned poultry meat and the cooked poultry including bone and breading shall not contain more than 30 percent breadings.

(iii) Heat processed rolls which have more than 2 percent liquid remaining with or returned to the product shall be labeled as "(Kind) Roll with Natural Juices." If any liquid other than natural cookout juices is added, the products must be labeled to indicate that fact; e.g., "Turkey Roll with Broth." Liquid shall not be returned or added to product within this subdivision (iii) in excess of the amount normally cooked out during preparation.

(5) *(Kind)—burgers.* Such product shall consist of 100 percent poultry meat of the kind indicated, with skin and fat not in excess of natural proportions. Product containing fillers or binders shall be named "(Kind) Patties."

(6) *Other poultry dishes and sperialty items.* (i) Poultry dishes and specialty items listed in Table IV of this paragraph shall meet the requirements set forth in said Table, irrespective of the type of packaging, and the percentages in Table IV shall be calculated on a ready-to-serve basis, except that soup bases in institutional packs which are prepared for sale to institutional users shall have a minimum of 15 percent cooked deboned poultry meat based on the weight of the soup base product. Products similar to those listed in Table IV, but having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

(ii) Products of the types specified in §§ 81.208 (a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken, turkey, etc. in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 percent chicken meat on a ready-to-serve basis may not be labeled as "Chicken Noodle Soup" but, when appropriate, could be labeled as "Chicken Flavored Noodle Soup."

Table IV

Product name[1]	Minimum percent cooked deboned poultry meat of kind indicated	Minimum percent cooked poultry of kind indicated, including bone
(Kind) Ravioli	2	
(Kind) Soup	2	
Chop Suey with (Kind)	2	
(Kind) Chop Suey	4	
(Kind) Chow Mein without noodles	4	
(Kind) Tamales	6	
Noodles or Dumplings with (Kind)[2]	6	
(Kind) Stew	12	
(Kind) Fricassee of Wings		40
(Kind) Noodles or Dumplings[2]	15	30
Creamed (Kind)	20	
(Kind) Cacciatore	20	40
(Kind) Fricassee	20	40
(Kind) A-La-King	20	
Sliced (Kind) with Gravy	35	
Minced (Kind) Barbecue	40	

4. Section 81.208 is amended to read:

§ 81.208. Exception from definition of "poultry product" of certain human food products containing poultry.

Section 4(e) of the Poultry Products Inspection Act (21 U. S. C. 453 (e)) defines the term "poultry product" to include any human food product consisting of any edible part of poultry separately or in combination with other ingredients, unless such human food product is exempted by the Secretary from such definition. It has been determined that the effectuation of the purposes of the Act does not require the full application of the requirements of the Act

1. The product name may contain other appropriate descriptive terms such as "noodle"; e.g., "Chicken Noodle Soup".

2. Product also includes rice or similar starches.

and the regulations to the following human food products which consist in part of edible parts of poultry. This determination is based upon the fact that such products contain an extremely small percentage of poultry and consist principally of non-poultry ingredients. Therefore, the Poultry Products Inspection Act and the regulations thereunder shall be applicable to the following products only to the extent of requiring that they comply, in the judgment of the Secretary, with the conditions specified below and said products, if they so comply with such conditions, are

§ 81.208. Execption from definition of "poultry product" exempted from the definition of "poultry product" and the application of said Act and the regulations:[1]

(a) Any human food product (in a consumer package) not provided for in paragraph (c) of this section, if: (1) It contains less than 2 percent cooked poultry meat (deboned white or dark poultry meat, or both); (2) it contains less than ten percent of cooked poultry skins, giblets, or fat, separately, and less than ten percent of cooked poultry skins, giblets, fat, and meat (deboned white or dark poultry meat or both) in any combination; (3) the poultry ingredients used in the product were prepared under inspection as defined in § 81.1, or were inspected under a substantially equivalent foreign inspection system and imported in compliance with the Act and the regulations; (4) the immediate container of the product bears a label which shows the name of the product, a statement of the ingredients in the product, including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measures of the contents, and the name and address of the person preparing or distributing the product; and (5) the product does not in any re-

1. The Federal Food, Drug, and Cosmetic Act (21 U. S. C. 301 et seg.) is applicable to all such exempted products to the extent that the Poultry Products Inspection Act is not made applicable thereto.

spect have a false or misleading label. (See § 81.134 with respect to labeling.) The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared according to the serving directions on the consumer package.

(b) Any human food product (in an institutional pack), not provided for in paragraphs (c) of this section, if: (1) It is prepared for sale only to institutional users, such as hotels, restaurants, and boarding houses, for use as a soup base or flavoring; (2) it contains less than 15 percent cooked poultry meat (deboned white or dark poultry meat, or both), computed on the basis of the moist, deboned, cooked poultry meat in such product; and (3) it complies with the provisions of paragraph (a) (3), (4) and (5) of this section in all respects.

(c) Bouillon cubes, poultry broths, gravies, sauces, seasonings, and flavoring if: (1) They contain poultry meat or poultry fat only in condimental quantities; and (2) they comply with the provisions of paragraph (a) (3), (4) and (5) of this section in all respects.

(Sec. 14, 71 Stat. 447, 21 U. S. C. 463; 19 F. R. 74, as amended.)

The amendments of the provisions of §§ 81.134 and 81.208(a) of the regulations have been the subject of extensive public rule making procedures, involving submission of comments by interested persons both at an oral hearing and in writing. The information developed in the rule making procedures disclosed a need not only to amend these provisions but also to make related changes in the provisions of §§ 81.1, 81.6 and 81.208 (b) and (c). It appears that such information affords a sound basis on which to determine the action to be taken concerning the latter provisions and that further public rule making pro-

cedure is not necessary to inform the Department as to the views of affected persons.

Changes made in the amendments of §§ 81.134 and 81.208(a) from the proposed amendments of these provisions are not substantive but are for purposes of clarification.

Further public rule making procedure would delay issuance of the final amendments in this matter and such delay would prolong uncertainty and be detrimental to the affected industry and the public. Therefore, in accordance with section 4 of the Administrative Procedure Act (5 U. S. C. 1003), it is found upon good cause that further public rule making procedure with respect to the amendments is impracticable and unnecessary.

The foregoing amendments shall become effective January 1, 1965. This will afford persons a reasonable opportunity to obtain supplies of new labels or to revise formulations, if necessary, prior to January 1, 1965.

Done at Washington, D. C., this 1st day of July 1964.

G. R. Grange,
Deputy Administrator, Marketing Services.

[F. R. Doc. 64-6728; Filed, July 6, 1964; 8:50 a.m.]

APPENDIX C.

OPINION OF THE DISTRICT COURT GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

(December 7, 1964.)

The Court: Plaintiff, The Borden Company, seeks a preliminary injunction pursuant to Federal Rule 65 which would restrain the United States Secretary of Agriculture, defendant, from enforcing against plaintiff certain amendments to Sections 81.134 and 81.208 of the regulations under the Poultry Products Inspection Act pending final disposition of this action. These amendments, respectively, would deem poultry products containing less than 2% chicken meat on a ready-to-serve basis mislabeled if they make unqalified use of the "kind" name (e.g. chicken or turkey) in the product name, and would withdraw exemption of less-than-2% poultry products from the Inspection Act where mislabeling, as defined above, is found. This latter regulation would then place exclusive jurisdiction over the products in question in the Department of Agriculture as per Scetion 18(a) of the above Act.

The general purpose of a preliminary injunction is to preserve the *status quo* until a final determination of the action upon full hearing. 7 Moore's Section 65.04(1).

Thus,

> "When a motion for preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion 'upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the

probability of the ultimate success or failure of the suit, the balance of damage and convenience generally. . . .' " *Perry* v. *Perry,* 190 F. 2d 601, 602.

and,

". . . On issuing a preliminary injunction, the court, except in very rare instances, must always consider the balance of resultant injury to the parties, and in many cases to the public, and where the right is one in the exercise of which the public has a vital interest . . . the court may refuse a preliminary injunction, when, if the matter concerned only the parties to the suit, it would grant it." *Cook Brewing Co.* v. *Garber,* 168 Fed. 942. Based upon the above standards and the record now before it—including the argument just heard—this Court can make the following findings and conclusions which it feels are dispositive of the motion herein presented.

(1) Compliance with the regulations in issue would compel plaintiff's subsidiary, Wyler, either to change the nature of its soup products by adding freeze-dry chunks of chicken meat, or to change its trade name. Regarding the first alternative, there is evidence that such a process could result in less appetizing fare without any appreciable increase in nutritional value. Plaintiff has further estimated that retail costs to the consumer would at the least be doubled from the present $.10 per packet. As to the second alternative, injury to goodwill seems an inevitable by-product of any brand-name change. While actually remaining identical in content, a soup of lesser quality and value than the subject product would be connoted by the label qualifications prescribed by the proposed regulations. Plaintiff has further noted, referring to the Washington Hearing on this matter, that some two-thirds of all such soup mixes (in terms of sales volume) are affected by these regulations. (See Affidavit of Walter R. Neisser, President of Wyler & Co. dated November 23, 1964, and Plaintiff's memo in support of this motion.)

2. Presumably, in this matter the interests of the defendant, Secretary Freeman and the United States

Department of Agriculture, are founded in protection of the consumer public. Such is the general nature of the Poultry Products Inspection Act under which the contested regulations were promulgated, and the specific nature of any effort to police false and misleading advertising. Respecting the public interest, the facts show that the present Wyler's label has proven acceptable for over 25 years to government and consumer alike. As recently as 1959, the Department of Agriculture approved the Wyler labels. (Plaintiff Complaint Exhibits C and D.) Wyler further avers that during its 25-year history it has received—to the best of its knowledge—no complaints dealing with the meat content of its mixes. On the contrary, accelerating sales figures would seem to infer some degree of customer satisfaction. (See Neisser affidavit, and Plaintiff's memo citing Washington Hearing.) Moreover, in this consideration of public interest, the Court fails to see how any price increase such as envisaged by plaintiff as a result of the new 2% requirement could accrue to the benefit of the already hard-pressed consumer. And this particularly when the cost increase is not accompanied by a commensurate rise in food value.

3. Lastly, a point is raised which the Court finds quite troublesome, concerning the actual statutory jurisdiction of the Secretary to promulgate any regulations involving less-than-2% products presently exempted from inspection. Plaintiff has steadfastly, and somewhat persuasively, argued that no authority in fact exists. This argument is made in addition to a forceful assertion by plaintiff of insubstantial evidential grounds upon which to base the proposals here questioned. (See Plaintiff Complaint and memo.)

Thus, taking the probability of irreparable damage to plaintiff-movant, the apparent lack of any harm to government or consumer brought about by a delay, and the substantiality of plaintiff's claim, it is the considered judgment of this Court that the motion for preliminary relief under Federal Rule 65 should be granted.

APPENDIX D.

OPINION OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(June 10, 1966)

LANE, *District Judge:*

On September 21, 1964, The Borden Company filed a complaint in this court contesting the validity of certain amended regulations promulgated by defendant, the Secretary of Agriculture of the United States, pursuant to regulatory powers granted him under the Poultry Products Inspection Act,[1] hereinafter referred to as the Poultry Act. The regulations scheduled to be effective as of January 1, 1965, would have prohibited plaintiff's subsidiary, Wyler and Company, from continued sale of "Wyler's Chicken Noodle Soup Mix" and "Wyler's Chicken Rice Soup Mix" as labeled and formulated prior to that date.[2]

Plaintiff's soup mixes involved here are dehydrated food products sold throughout the United States in foil envelopes. The Wyler chicken noodle soup mix has been sold for over 25 years and contains powdered chicken meat in an amount greater than 2% of the weight of the package, but less than 2% of the volume of the soup in its ready-to-serve state. The Wyler chicken rice soup has been sold for over 15 years, and contains the same proportion of powdered chicken. Since their introduction into the market, these soups have borne the same labels and been produced pursuant to substantially the same formulae as at present.

1. 21 U. S. C. §§ 451 *et seq.* (1964).
2. 7 C. F. R. §§ 81.134 and 81.208 (Supp. 1965).

The regulations as amended (§§ 81.134 and 81.208) are the latest product of nearly continuous efforts by the Secretary of Agriculture since the passage of the Poultry Act in 1957 to resolve a dilemma. The Secretary has sought to remove from his jurisdiction certain products which contain so little poultry that to regulate them constitutes an unnecessary burden on the Department of Agriculture and a waste of its expertise. By promulgating the predecessors of §§ 81.134 and 81.208, the Secretary had exempted from the operation of the Poultry Act all soup products with less than 2% poultry content.

Under that prior regulatory scheme, such products as dehydrated soups containing less than 2% poultry meat were still calling themselves "Chicken Soup" or otherwise purporting to contain substantial amounts of poultry meat. Having divested himself of jurisdiction over such products, the Secretary of Agriculture was powerless to insure that their labels were not false and misleading. Also, soup manufacturers such as Campbell Soup Company, whose products contain more than 2% poultry meat and are necessarily more expensive to purchase, were complaining that their soups alone should be entitled to bear the unqualified "Kind" label, "Chicken Soup."

Early in 1964, the Secretary initiated steps calculated to effect more acceptable exemption provisions. Informal hearings were held in Washington, D. C., on March 23-25, 1964. Some interested parties, including plaintiff and other soup producers, expressed their views at these hearings. Others supplied written information or expressed their opinions by letter. On June 1, 1964, the amended regulations were issued. They read, where pertinent, as follows:

§ 81.134. *Product specifications for labeling purposes.*

(a) *Authorization to establish specifications.* The

Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

. . . .

(6) *Other poultry dishes and specialty items.*

(i) . . . . Products . . . . having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

(ii) Products of the types specified in § 81.208(a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken, turkey, etc.) in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 per cent chicken meat on a ready-to-serve basis may not be labeled as "Chicken Noodle Soup" but, when appropriate, could be labeled as "Chicken Flavored Noodle Soup."

. . . . .

§ 81.208. *Exemption from definition of "poultry product" of certain human food products containing poultry.*

Section 4(e) of the Poultry Products Inspection Act (21 U. S. C. 453(e)) defines the term "poultry product" to include any human food product consisting of any edible part of poultry separately or in combination with other ingredients, unless such human food product is exempted by the Secretary from such definition. It has been determined that the effectuation of the purposes of the Act does not require the full application of the requirements of the Act and the regulations to the following human food products which consist in

part of edible parts of poultry. . . . Therefore, the Poultry Products Inspection Act and the regulations thereunder shall be applicable to the following products only to the extent of requiring that they comply, in the judgment of the Secretary, with the conditions specified below and said products, if they so comply with such conditions, are exempted from the definition of "poultry product" and the application of said Act and the regulations:

(a) Any human food product (in a consumer package) not provided for in paragraph (c) of this section, if: (1) It contains less than 2 per cent cooked poultry meat (deboned white or dark poultry meat, or both); . . . and (5) the product does not in any respect have a false or misleading label. See § 81.134 with respect to labeling.) The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared according to the serving directions on the consumer package.

Plaintiff, following the publication of these regulations, brought action in this court; and after a hearing on December 7, 1964, defendant was preliminarily enjoined from enforcing the regulations, pending judicial review of the administrative proceedings. Upon due application to this court, Campbell Soup Company, on September 30, 1965, was granted leave under F. R. C. P. 24(b) to intervene as a party defendant.

This court will consider not only the question of the evidentiary support for the contested rulings, but also several critical jurisdictional and procedural issues raised by plaintiff.

Plaintiff Borden alleges first that there is not statutory authority for the promulgation of such general, quasi-legislative standards of identity for poultry products as are set forth in § 81.134. Plaintiff also contends that the Secretary may not condition a product's exemption from

the operation of the governing act upon the type of label used, as is done in § 81.208.

The relevant statutory provisions in the Poultry Act are as follows:

21 U. S. C. § 453. *Definitions*

For purposes of this chapter—

. . .

(e) The term "poultry product" means any poultry which has been slaughtered for human food . . . in accordance with the rules and regulations promulgated by the Secretary, any edible part of poultry, or unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

§ 457. *Labeling* . . .

. . .

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. . . .[3]

. . .

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

3. Section 457 goes on to outline specific procedures for a case by case, quasi-adjudicative determination by the Secretary of the existence of misleading labels, with specific provisions for appeal by an aggrieved party to the United States Court of Appeals.

§ 463. *Rules and Regulations*

The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter.

§ 467. *Jurisdiction and powers of Secretary*

(a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this chapter shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

Jurisdiction of the Secretary of Agriculture.

In pressing its initial jurisdictional attack, plaintiff asks this court to compare the powers of the Secretary of Agriculture under the Poultry Act with those of the Food and Drug Administration under the Food, Drug and Cosmetic Act.[4] Plaintiff asserts that the latter statutes empower the F. D. A. to promulgate regulations establishing general "standards of identity"[5] for products under its jurisdiction, whereas the Poultry Act confers no such authority upon the Secretary of Agriculture. Plaintiff further contends that regulation § 81.134 is in fact such a general standard of identity because it purports to establish requirements which are not based on evidence of a "false, deceptive or misleading" label in a particular case. Without such particular evidence of consumer deception, plaintiff states, the regulation is a general standard such as the Secretary of Agriculture is not authorized to promulgate. In the present case, plaintiff continues, there are no record proofs that the labels on the Wyler's soups, or any others, affected by the regulations are "false, deceptive or mis-

4. 21 U. S. C. §§ 301 *et seq.* (1964).
5. 21 U. S. C. § 371(d) (1964).

leading." Therefore, plaintiff concludes, defendant Secretary of Agriculture has unlawfully promulgated a general standard of identity without regard to the requisite determination that the labels in issue are in fact false, deceptive and misleading.

All defendants assert that the Secretary of Agriculture does have the power to establish standards of identity by regulation. In support of this argument, the case of *Houston* v. *St. Louis Packing Co.*, 249 U. S. 479 (1918) is cited. That case involved the authority of the Secretary of Agriculture under the Meat Inspection Act to promulgate the following standards of identity for sausages:

> "Sausage shall not contain cereal in excess of two per cent: When cereal is added its presence shall be stated on the label or on the product.
>
> "Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent. . . ." *Id.* at 480.

These regulations considered in *Houston* were effected "for the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name. . . ." *Ibid.* The applicable enabling provisions in the Meat Inspection Act were:

> " '*No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.*' and that 'said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary

of Agriculture not inconsistent with the provisions of this Act.'" *Id.* at 481 (emphasis supplied by that court).

The Supreme Court referred to the powers of the Secretary of Agriculture, stating:

> "Whether or not the term 'sausage' when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act. . . ." *Id.* at 484.

The similarity between §§ 457(b) and 463 of the Poultry Act and the statutory grants of power cited in the *Houston* case is obvious. This court notes that the Meat Inspection Act does not (or did it in 1918) contain the "standards of identity" clause which plaintiff says is necessary to empower an administrative agency to promulgate general regulations. Nevertheless, in the *Houston* case, provisions of the Meat Inspection Act nearly identical to those of the Poultry Act were held to empower the Secretary of Agriculture to establish general regulations controlling the cereal and water content of products labeled "Sausage." Therefore, it follows that the Poultry Act contains a similar grant of authority to the Secretary concerning poultry products employing the "Kind" label.

Plaintiff argues that the hearing and review provisions of § 457(b) of the Poultry Act see footnote 3, *supra*) limit the Secretary of Agriculture to a case by case adjudicative procedure when dealing with potentially false or misleading labels. There is no doubt that those provisions do outline such a procedure. The Secretary, however, is not limited to that procedure alone. He is given additional powers. Sentence one of § 457(b) expressly prohibits false and mis-

leading labeling, as does § 458(d). Section 463 expressly grants to the Secretary the power "to promulgate such rules and regulations as are necessary to carry out the provisions of this chapter." Therefore, the Secretary has a general legislative power concerning matters covered by the Poultry Act *in addition* to whatever adjudicative power is conferred by particular provisions thereof.[6]

Since the Secretary of Agriculture may promulgate general regulations that indicate the circumstances under which the "Kind" label is deemed to be deceptive, the regulation in question (§ 81.134) is valid, and plaintiff's initial attack on the jurisdiction of the Secretary must fail.

In contesting regulation § 81.208, plaintiff contends the Secretary has exceeded his statutory power by exempting a less than 2% poultry meat product, and at the same time retaining the right to review and act upon the labeling used on such exempt product. The source of the Secretary's power to exempt certain foods from consideration as "poultry products" is § 453(e), and plaintiff's soups are poultry products as defined in said section unless and until the Secretary acts to exempt them. The enabling statute has been drawn with a view to relieving the Secretary of the unduly burdensome task of supervising the manufacture and sale of products that have little poultry meat, i.e., under 2%. Indeed, this is the primary reason for exemption of a product and was the sole requirement of § 81.208 before the promulgation of the amendment here under attack. If plaintiff's reasoning is accepted, the 2% provision exempting his product is the sole portion of the regulation that has been properly enacted, and the remaining portion pertaining to the Secretary's right to regulate the labels of such product would be null and void. If this

6. This court notes that § 457(b) nowhere states that it is the exclusive mode of operation for the Secretary in the labeling field; nor has any case so construing that statute come to our attention.

is so, it necessarily follows that because the enabling statute directs that exempt poultry products are to be administered under the Food, Drug and Cosmetic Act, any supervision of the labeling used on such exempt products would be the business of the Food and Drug Administration.

The Poultry Act contains no requirement that the Secretary consider a product for exemption on the sole basis that its meat content is minimal. There is no indication that Congress intended to so limit the Secretary's powers of exemption. Indeed, such a limitation might well effect one of two equally undesirable results: (1) the Secretary might find it necessary to refrain from exempting any products, however small the chicken meat content, in order to prevent the possibility of false, deceptive labeling; (2) the Secretary might be forced to exempt products solely on the basis of their low chicken meat content. In the first instance, the undue burdens of administration and the wasted expertise would be present. If the second alternative were chosen, producers of exempt soup products would be entitled to employ the "Kind" label despite the lack of a reasonable level of meat content. Such use of the "Kind" label would constitute a threat to unsuspecting consumers, and would be unduly prejudicial to producers who place on the market the more expensive products, with meat content sufficient to justify use on the "Kind" label.

It is not an answer to this problem to argue that the Food and Drug Administration could or would remedy the attendant difficulties. Prior to the promulgation of the amendment to § 81.208, use of the "Kind" label on exempted soups of slight meat content was not controlled. Indeed, this undesirable situation was the very reason for amending that regulation.

Section 81.208 presently exempts from the definition of poultry product all soups with less than 2% chicken meat content which are not sold under a false or misleading label.

The "Kind" label on a less-than-2% product is deemed misleading. All other soups containing "any edible part of poultry separately or in combination with other ingredients"[7] *remain* poultry products. By providing for the exemption in this way, the Secretary makes certain that he retains jurisdiction over all deceptively labeled products containing edible poultry. He is thus able to deal effectively with such labeling pursuant to the Poultry Act's mandate. At the same time, non-deceptive products of minimal meat content no longer burden him or his staff.

The administrative duty of establishing a standard of exemption from a defined term such as "poultry product", is analogous to establishing the limits of an "area of production" in accordance with legislative direction. A study of cases involving definitions of statutory terms indicates that an administrative official "fulfills his role when he makes a reasoned definition." *Mitchell* v. *Budd*, 350 U. S. 473, 480 (1956). *Mitchell* involved a definition of the term "area of production" as used in the Fair Labor Standards Act.[8] In summarizing the definition promulgated, the Supreme Court observed:

> "The Administrator's definition of 'area of production' provides that a plant is within the 'area of production' if it is located (1) 'in the open country or in a rural community' which is defined as not including 'any city, town or urban place of 2,500 or greater population' and (2) within a specified mileage distance from the source of 95% of its commodities." *Id.* at 476.

The United States Court of Appeals for the Fifth Circuit had declared this definition invalid on the grounds that "area" contemplated mileage boundaries only and did not provide for "any qualification by reason of size of the town where the establishment is located." *Id.* at 477. The Su-

7. 21 U. S. C. § 453(d) (1964).

8. 29 U. S. C. §§ 201 *et seq.* (1964).

preme Court, reversed on the grounds that Congress intended that a line be drawn "between agricultural enterprises operating under rural-agricultural conditions and those subject to urban-industrial conditions." *Id.* at 478. In this context, therefore, the Administrator could phrase his definition of the term "area of production" in such a way as would serve the Congressional intent. The Court concluded:

> "No definition of 'area of production' could produce complete equality, for the variables are too numerous. The Administrator fulfills his role when he makes a reasoned definition. See *Gray* v. *Powell*, 314 U. S. 402, 411. On no phase of this problem can we say that the Administrator proceeded capriciously or by the use of inadmissible standards. Experts might disagree over the desirability of one formula rather than another. It is enough for us that the expert stayed within the allowable limits." *Id.* at 480.

The *Gray* case cited above involved a determination by the Director of the Bituminous Coal Division of the Department of the Interior that the Seaboard Air Line Railway Company was not a "producer" of coal. The function of making such a determination had been specifically delegated to the Director by Congress. The Court held Congress had vested in the Director the power to make "a sensible exercise of judgment" in reaching his decision, and that the Director had done so. *Gray* v. *Powell*, 314 U. S. 402, 413 (1941).

The facts of the case at bar clearly indicate that § 81.208 of the Secretary of Agriculture's regulations is "a reasoned definition" of what products are to be considered exempt from the term "poultry product." This regulation is "a sensible exercise of judgment" by the Secretary; for it provides for the best possible workable compromise between the policies of (1) insuring against the use of false

or misleading labels and (2) allowing the Secretary to divest himself of jurisdiction over products whose poultry content is minimal.

For the reasons outlined above, this court concludes that the Secretary of Agriculture does have the authority to promulgate the plan of exemption set out in § 81.208. Therefore, plaintiff's second jurisdictional attack falls.

Scope of Review.

There are enumerated in § 10(e) of the Administrative Procedure Act [5 U. S. C. § 1009(e)] the powers and duties of a court called upon to review governmental agency actions:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Plaintiff urges that the "substantial evidence" test of § 10(e)(B)(5) of the Procedure Act is the scope of review appropriate for the present case. That requirement, however, is applicable only to "any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute." *Ibid.* Sections 1006 and 1007 of Title 5 primarily concern adjudicative hearings and decisions by an agency, and are applicable in quasi-legislative rule-making cases only "where rules are required by statute to be made on the record after opportunity for an agency hearing. . . ."[9] The Poultry Act does not require such an agency hearing as is contemplated by either § 10(e)(B)(5) or § 4(b) of the Procedure Act when the Secretary of Agriculture is exercising his rule-making power to exempt certain foods from the classification "poultry product."[10] When no such formal hearing is required, a federal agency which is in the process of making a rule or regulation need only follow the notice and informal hearing requirements of §§ 4(a) and 4(b) of the Procedure Act [5 U. S. C. §§ 1003(a), (b)], which are:

> (a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register . . . and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .
>
> (b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an op-

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9. Administrative Procedure Act § 4(b); 5 U. S. C. § 1003(b) (1964).

10. Cf. *Sterling Davis Dairy* v. *Freeman*, ... F. Supp. ..... (D. C. N. J. 1965, opinion filed October 7, 1965), where this court applied the substantial evidence test in reviewing a formal agency hearing specifically provided for in the Agriculture Marketing Agreement Act of 1937. 7 U. S. C. §§ 601 *et seq.*

portunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . .[11]

Since neither §§ 1006 and 1007 of Title 5 nor any provisions of the Poultry Act require a formal "agency hearing" in the case at bar, this court concludes that Congress did not intend that the "substantial evidence" test of § 10 (e) (B) (5) of the Procedure Act be applied to the record here.

Plaintiff argues alternatively that if no formal hearing at the agency level is required, a reviewing court must conduct a trial de novo as to relevant facts, pursuant to § 10(e) (B)(6) of the Procedure Act. Despite the expressions of policy in the House Committee report alluded to by plaintiff,[12] this court holds, as have others, that where an agency properly exercises its rule-making function, and during the course thereof compiles a substantial record by means of documents and oral testimony, a trial de novo on the facts which were the basis for the rules adopted is not available to one contesting their validity.[13] To hold otherwise would be to force many agencies to hold time-consuming formal hearings, although the statutes empowering those agencies require no such hearings. Thus the public policy behind relegating to agencies such rule-making power as would otherwise lie in Congress alone, i.e. speed and efficiency, would be thwarted. The Poultry Act does not require a trial de novo of facts relevant to the Secretary of

11. In the case at bar, the Secretary complied with §§ 4(a) and 4(b) by giving timely notice of and subsequently holding the informal hearing of March 23-25, 1964.

12. See page 53 of plaintiff's memorandum on the evidence.

13. *Noren* v. *Beck*, 199 F. Supp. 708 (S. D. Cal. 1961).

Agriculture's exercise of his "exemption" powers under § 453(e) thereof. Nor is the court presented with an administrative "adjudication" such as might be "subject to a subsequent trial of the law and the facts de novo in any court."[14]

Having determined that neither the substantial evidence test of § 10(e)(B)(5) nor a trial de novo under § 10(e)(B)(6) of the Procedure Act is appropriate for the present case, this court concludes that its scope of review is limited to a determination of whether the promulgation by the Secretary of regulations §§ 81.134 and 81.208 was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[15]

The Record.

Should it be found that the evidence in the record supporting the adoption of the regulations as promulgated is sufficient to refute the contention that the Secretary acted arbitrarily, capriciously, or in abuse of his discretion, the regulations are to be declared valid. In reviewing the record, it is, of course, not the province of the court to substitute its judgment for that of the administrative agency properly authorized by Congress to exercise rule-making functions in areas where that agency possesses a unique expertise.

The evidence which the Secretary himself thought was particularly persuasive is discussed in a *Statement of Considerations* published in the Federal Register of July 7, 1964. The Secretary alluded to the following: (1) soup formulae on file with the U. S. D. A., (2) "written comments received," (3) "data . . . submitted at the oral

14. Administrative Procedure Act. § 5; 5 U. S. C. § 1004 (1964).

15. Administrative Procedure Act § 10 (e) (B) (1); 5 U. S. C. § 1009(e) (B) (1) (1964).

hearing on March 23-25, 1964." Referring to categories (2) and (3), he stated:

> "These comments and testimony came from customers or consumer oriented groups, representatives of the poultry industry and poultry associations, soup manufacturers, and other interested persons."

The oral testimony included that of Dr. Cliff D. Carpenter, a consultant to the poultry industry who testified that the preservation of the confidence of consumers required a standard of minimum poultry meat content in poultry products. He cited examples where unchecked diminishing of the meat content of chicken pies had deceived consumers and thus produced a reaction which effected a sharp drop in consumption. Also, Arnold Mayer, Legislative Representative of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, said that a consumer had the right to expect at least 2% meat, measured on a ready-to-serve basis, in soups bearing the unqualified kind label. Further, several executives of major soup companies[15] testified in favor of the regulations as finally promulgated, as did H. P. Schmitt, research director for the National Association of Frozen Food Packers.

Written comments included a letter from Mrs. Esther Peterson, the Special Assistant to the President for Consumer Affairs, dated April 15, 1964, stating:

> "Since the label on a product is the consumer's primary guide in making a wise decision, it must be meaningful. Products which differ substantially in poultry content should not bear the same or similar labeling terminology. The establishment of minimum standards for labeling purposes is in accordance with one of the important rights of consumers as set forth by the President—the right to be informed."

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15. Andrew Paretti, president and general manager of Bon Vivant Soups, Inc.; Carl Hinshaw of Chalet Suzanne Foods, Inc.; Donald W. Leeper of H. J. Heinz Company; and Donald M. Mounce, a vice-president of Campbell Soup Company.

Mrs. Peterson also contended that since the ready-to-serve stage was of primary importance to the consumer, all minimum content standards should relate to that stage regardless of the form of packaging. Another letter which appears is that of New York University professor Dr. Irene Oppenheim of the Department of Home Economics, who, on April 6, 1964, wrote to Mr. Kilpatrick of the Department of Agriculture that "intelligent consumer choice" in this day of multiple soup products demanded minimum content standards measured on a ready-to-serve basis. Senators, Congressmen, and home economics associations also submitted written statements.

We are dealing with a regulation that requires computing the percentage of the poultry ingredients on the basis of the cooked ready-to-serve product prepared according to the serving directions on the consumer package. The statistical evidence relied upon by the Secretary established that more than 90% of all poultry soups placed on the market meet this test, i.e. they contain more than 2% poultry meat when served. Therefore, it is clear that the Secretary's choice of that figure as the acceptable minimum meets the test of reasonableness.

In the *Statement of Considerations,* the Secretary specifically referred to the most telling evidence against the regulations adopted. He noted that although many home cookbook recipes do not call for chunks of chicken meat, many others do, and that in any case these recipes are not necessarily "a useful guide in establishing standards for similar commercially prepared products." He resolved an ambiguity concerning the name given to a less-than-2% soup by the United States Army by determining that the approved title is "Soup, Dehydrated, Chicken Flavored." He discounted the relevancy of surveys and polls conducted at plaintiff Borden's request and observed that the findings therein are susceptible to interpretations which would in-

dicate consumer deception with a less-than-2% product bearing the unqualified "Kind" name. Finally, the Secretary recognized the many years of consumer acceptance of such soups, but concluded that acceptance of a product "does not necessarily mean that it does not have misleading labeling."

The *Statement of Considerations*, a candid report by the Secretary of his analysis and findings, clearly indicates that the Secretary objectively weighed all the evidentiary material brought to his attention, and took into account the interests of the various contributors. We find that the record contains evidence sufficient to support the amended regulations against the attack that they are arbitrary, capricious, beyond the scope of the Secretary's discretion or otherwise unlawful. Indeed, this court is satisfied that even if the evidential standard of "substantial evidence" were to be applied to the record herein reviewed, the proofs would be sufficient to meet such a test.

Defendants are to submit a form of judgment.

APPENDIX E.

ORDER AND JUDGMENT OF THE DISTRICT COURT.

(July 13, 1966.)

This matter having come on before the Court on the motion for summary judgment filed by the defendants, and the Court having considered the pleadings, briefs, and oral argument of counsel and having reviewed the certified record of the Department of Agriculture regarding the promulgation of the challenged amendments and having rendered its opinion on June 10, 1966, it is this 13th day of July, 1966,

ORDERED, ADJUDGED AND DECREED

1. That the motion for summary judgment filed by the defendants, be, and it is hereby, granted.

2. That the preliminary injunction entered by this Court on January 11, 1965, be, and it is hereby, vacated.

3. That the complaint filed by the plaintiff, be, and it is hereby, dismissed.

LANE, *J.*
United States District Judge.

APPENDIX F.

OPINION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed December 29, 1966.)

PER CURIAM.

In the instant case the Borden Company sought declaratory and injunctive relief against the enforcement of certain regulations promulgated by the Department of Agriculture, under the authority of the Poultry Products Inspection Act, 21 U.S.C.A. 451 et seq., with relation to the labeling of its products, dehydrated chicken noodle soup mix and dehydrated chicken rice soup mix.

The District Court rejected the Borden Company's contention that the Regulations were not supported by substantial evidence and were arbitrary. It further held that the defendant Secretary of Agriculture had authority to promulgate the Regulations. The Borden Company appealed from the District Court's entry of summary judgment in the Secretary's favor.

On review of the record we find no error. The Order and Judgment of the District Court entered July 13, 1966 will be affirmed on the well-reasoned opinion of Judge Lane. 256 F. Supp. 592 (1966).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX G.

JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 13, 1966, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF,
Clerk.

December 29, 1966.